

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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In the Court of Appeals OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1904.

No. 1412.

277

AMERICAN SECURITY AND TRUST COMPANY (A
BODY CORPORATE, DOING BUSINESS IN THE
DISTRICT OF COLUMBIA), NORMAN GALT AND
STERLING GALT, EXECUTORS OF THE TES-
TAMENT AND LAST WILL OF CHARLES E.
GALT, DECEASED, APPELLANTS.

vs.

REDFORD W. WALKER AND WILLIAM H. WALKER
TRADING AS R. W. WALKER & SON.

BRIEF ON BEHALF OF APPELLANTS.

WILLIAM A. MCKENNEY
HAYDEN JOHNSON

For Appellants.

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BRIEF ON BEHALF OF APPELLANTS.

Statement of Case.

This is an action of debt on a specialty, brought by the appellees against the appellants for rent alleged to be due under an agreement of lease, dated October 25, 1899. The declaration was subsequently amended by the addition of a second count in assumpsit for the alleged violation of a parol agreement of lease of the same property for the same period, namely, from September 1, 1900, to September 1, 1901 (Rec. p. 4).

The pleas are *non assumpsit* and *nil debit* (Rec. p. 3).

By stipulation of counsel a jury trial was waived (Rec. p. 5) and the case was heard by the court and decided in favor of the plaintiffs upon the following agreed statement of facts (Rec. p. 6):

"That on October 25, 1899, defendants' decedent entered into a lease with the plaintiffs for premises 1718 Twenty-first street northwest, by the year, commencing September 1, 1899, at yearly rental of \$780, payable at rate of \$65 per month in advance on the first day of each month, which said lease is hereto attached and made a part hereof (Rec. p. 7).

"That defendants' decedent took possession and retained the premises for the full term of one year, and as hereinafter stated.

"That prior to the 1st day of September, 1900, to wit, on or about July 18, 1900, Norman Galt, a brother of decedent, duly authorized so to do, addressed a letter to the plaintiffs from Bridgeport, Conn., agreeing on behalf of decedent to lease for another year said house and premises, provided an electric bell was put in his bedroom, new weights put in the lift, and fence in the yard painted, which said letter is hereto attached and made a part hereof (Rec. p. 8).

"On July 19, 1900, plaintiffs wrote decedent agreeing to make the improvements suggested, and said:

" 'We enclose you new lease from termination of present lease, September 1, 1900. Please sign and return to us. We will make the improvements mentioned.'

"Which said letter and lease are hereto attached and made a part hereof (Rec. p. 9).

"That new lease never was signed by decedent.

"That the improvements which the plaintiffs promised to make were ordered by them; that the extra weights were ordered; that the electrician went to the house to fix the bell, but could not do so owing to Mr. Galt's condition.

"That the total cost of the improvements requested was

not in the excess of \$10, viz, painting fence \$5 or \$6, weights \$1.50, and bell about \$2.

"Prior to September 1, 1900, Charles E. Galt, then a very sick man, returned to Washington and occupied the house in question, and died there on the 4th day of September, 1900.

"That at no time between the 31st day of August and the date of his death was he in physical condition either to move or to be moved.

"That shortly after the funeral of Mr. Galt the key to said house was delivered at the office of the plaintiffs by Mr. Norman Galt, one of the executors under the will of Charles E. Galt, to Mr. William L. Lanning, a clerk of plaintiffs, whereupon substantially the following conversation took place, viz:

"Norman Galt called and said to me:

"Of course, you know of my brother's death and that he had not signed the contract sent to him. The house will be vacated between now and the 15th and I will send the keys. Don't show the house until it is vacated. I don't suppose, now that my brother is dead and the contract not signed, that Mr. Walker will hold the estate for the rent.'

"I replied that was a matter which would have to be arranged with Mr. Walker.

"He then said to send the bill for rent for month of September to the American Security and Trust Company and that they would pay it.

"(Signed) WILLIAM L. LANNING."

"That the rent for the month of September, 1900, was paid to and received by the plaintiffs.

"That on November 17, 1900, the plaintiffs sent to the defendants, and they received the following letter (Rec. p. 10).

"And that on January 10, 1901, the plaintiffs sent to the defendants, and they received the following letter (Rec. p. 11)."

Assignments of Error.

The court below not having indicated in its opinion upon which count of the amended declaration it awarded its judgment, the appellants assign the following as reversible error:

First. If the judgment of the court was rendered upon the first count of the declaration, that the court erred in holding that the lease of October 25, 1899, created any other tenancy than a term for one year from the 1st day of September, 1899, and that said term was not terminated on the 1st day of September, 1900.

Second. If the judgment of the court was rendered upon the second count of the declaration, that the court erred in holding that under the agreed statement of facts the defendants' testator became other than a tenant by sufferance after the 1st day of September, 1900, and which tenancy was terminated by the surrender and acceptance of the keys to the premises.

ARGUMENT.

I.

The Written Lease of October 25, 1899, Was in Legal Effect a Lease for One Year Only.

The only theory upon which the plaintiffs could have recovered under the first count of their declaration is that the instrument of October 25, 1899, created a tenancy from year to year. Had a holding of that character been created, the requisite notice not having been given, the tenancy was not terminated at the expiration of the year, and the tenant became by operation of law a tenant for another year (*Spalding vs. Hall*, 6 D. C. 123).

By the terms of the instrument the lessor leased to the lessee the premises described "*by the year*, commencing on the 1st day of September, A. D. 1899."

Upon the principle that a lease must be for some definite term, this language has been conclusively held to convey a term for one year only.

In *Pleasants vs. Clayborn*, 2 Miles (Pa.), 304, the one question before the court was the quality of the estate conveyed to a lessee by use of the term "by the year." The plaintiff insisted that it created a tenancy from year to year; the defendant that a term for one year only was conveyed. The court, in sustaining the latter contention, says :

"It is contended by the plaintiff that the letting in this case was from year to year and the argument is founded upon the fact that the plaintiff, in reply to defendant's proposal, at the commencement of the year, which terminated before the time in question, said that she rented it *by the year* only, and never would rent it by the quarter, after which the defendant occupied a whole year, *and held over during the time in question*, which it is contended was an implied assent to hold it during the whole of another year. These facts certainly would be very proper for the jury to consider, if called upon to determine the fact of a contract for a term at least of two years. *But we are at present to declare the conclusion of law from the words relied upon 'by the year only' considered as terms of contract.*

"It is a principle of law that a term must have definite limits in respect of time, and there are many cases in the books which turn upon this principle. It has been decided, for example, that a lease for years generally, without saying how many, is a good lease for two years, because one year will not satisfy the expression. But it is not a good lease for more than two years, because there is no rule by which the continuance of the time can be determined unless *the least number that will satisfy the expression be deemed to be the number intended by the parties* (*Bro. Abs., Lease 13; 6 Co. Rep. 35.*)

"But we do not need the authority of cases to decide that the expression in question *did not bind the plaintiff or defendant to a longer occupation than one year in the first instance*, so that neither could by dis-

sent terminate the tenancy at the end of the year. Yet, if these words as terms of contract, by their proper force created a longer term than one year, absolutely, it would be impossible to say after what number of years the tenancy would expire, and it could certainly not be determined by either party without the consent of the other before the expiring of the term."

In the present case it was the understanding of the parties that the term of the lease was for one year only. In the letter of Norman Galt, written on behalf of his brother to the plaintiffs, he asks them to "also state when present lease expires (I think September 15)." The letter received in reply to this from the plaintiffs says: "We enclose you new lease dating from *termination of present lease, September 1, 1900.*"

If, then, as contended, the tenancy was for the term of one year only, it terminated on the last day of August, 1900. Negotiations for a new lease were commenced on July 18, 1900, and were not completed at the time the term expired. The tenant, in remaining over after the term, became in virtue of the act of July 4, 1864, which was then, September 1, 1900, in force in this District, a tenant by sufferance.

That act provides in part that all—

"occupation, possession, or holding of real estate . . . by lease, the terms of which have expired, shall be deemed and held to be tenancies by sufferance."

Were this act not conclusive of the nature of the holding after the expiration of the term, it could not be construed as a renewal of the term for another year. In *Pleasants vs. Clayborn, supra*, the court says in this regard :

"It may be added that the mere fact of holding over would not be sufficient evidence to justify a jury in finding the existence of a new contract, for that would be a finding against law, because it would

be repugnant to the elementary notions of the common law upon the subject. Of necessity there must be a holding over or a continuance of the possession after the expiring of the term under which the possession was taken in order to constitute a tenancy at sufferance, *and to allow a jury to find a contract from this fact alone would be to allow them to subvert the law.*"

Again, it will be remembered that the tenant held over pending negotiations commenced July 18, 1900, for a new lease which was not to be executed until certain repairs had been made.

In 18 Enc. Law (new ed.), 199, it is said :

"When the tenant holds over with the assent of the landlord, pending negotiations for another lease, this will of course rebut any presumption which would otherwise have arisen in favor of the creation of a periodical tenancy."

Doe vs. Stennett, 2 Esp. 7171.

Thetford vs. Tyler, 82 B. 95.

Wilcox vs. Raddin, 7 Ill. App. 594.

Smith vs. Allt., 7 Daly (N. Y.) 492.

Charles E. Galt died on the 4th of September, 1900. Shortly after the funeral the key to the premises was delivered and received at the office of the plaintiffs, which terminated the tenancy by sufferance then existing.

Elliott vs. Atkin, 45 N. H. 30.

Flagg vs. Dow, 99 Mass. 18.

Donkersley vs. Levy, 38 Mich. 54.

Otis vs. McMillan, 79 Ala. 46.

The rent for September was paid later in the month.

U.S. vs. Eliason - - - 16 Feb. 299

Evan vs. Humphreys - - - 9 App. 395

8 App. 469

II.

After September 1, 1900, the Defendants' Testator Became a Tenant by Sufferance Only, and There Was Neither a Written Nor Parol Lease for Another Year.

If the lease of October 25, 1899, terminated on September 1, 1900, and the few days holding over did not create a tenancy for another year, as above urged, the theory upon which the plaintiffs seek to establish the second term must grow out of the two letters of July 18, 1900, and July 19, 1900, of the testator's brother and the plaintiffs, respectively.

And the only question in respect to them must be: Do they, taken together, constitute a lease or only an agreement to make a lease? If they can be construed as a lease of the property the plaintiffs' contention is sound; but if only an agreement to make a lease, according to every authority it is unsound.

The question of a parol lease does not enter into the subject. The tenant was already in possession of the premises, and, being in possession, the two letters in question passed between him and his landlord. It is not suggested that any verbal communications were had between them. If the letters do not establish a lease there was no lease at all.

The letter of July 18, 1900, from Norman Galt to the plaintiff, says his brother "is willing to lease for another year house No. 1718 Twenty-first street, provided" certain repairs are made. In reply to this the plaintiffs say:

"We enclose you new lease dating from termination of present lease, September 1, 1900. Please sign and return to us. We will make the improvements mentioned."

The tenant, in other words, agreed that upon certain conditions he would lease the property for another year. The landlord agreed to perform these conditions. Such an understanding, it is believed, constitutes only an agreement to

lease. If the landlord performed his part of the agreement and the tenant did not sign a lease the landlord could sue only for breach of the agreement to lease and not for breach of the lease itself.

In 18 Enc. Law (new ed.), 598, it is said :

“An agreement to give a lease does not pass to the proposed lessee any legal estate prior to the execution of the lease or entitle him to recover in ejectment the possession of the premises; and if he secures the possession such an agreement will not avail him as a defense in an action of ejectment by the proposed lessor.”

The case of *Harrison vs. Palmer*, 76 Ala. 157, very nearly resembles the present one.

That was an action to recover possession of a plantation. The defendant claimed to hold the land sued for in virtue of a contract between him and the plaintiff, which the defendant insisted was a lease for five years, but which the plaintiff contended was only an executory agreement for a lease which had never been consummated.

An agreement in writing to lease the property in question, in the following terms, had been signed by both parties:

“Agreement between Mr. John T. Palmer and William M. Harrison, colored. The said Palmer agrees to rent or lease his Colloway place (that portion purchased by him of Dan Flinn) to Wm. M. Harrison, for five years at \$300 per year, payable annually from January 1, 1884, notes and papers to be drawn up as soon as convenient.”

After this a lease was prepared which was signed by Harrison only. The court, in its opinion, said:

“The inquiry in this case is whether there was a lease or only an executory agreement for a lease. If the former, then the plaintiff has no right to recover in this action. If the latter, then defendant can not

defend this suit, but will be left to his action for damages or to a bill for specific performance if he complies with the terms of the contract on his part."

And after reviewing the law applicable to the case, concludes:

"Under no circumstances, according to the rules above declared, can the defendant resist a recovery in this suit."

Jackson *vs.* Delacroix, 2 Wend. 433, is one of the leading cases upon the subject and reviews very carefully the principal English and American decisions respecting the distinction between leases and agreements to lease. In this case it was held:

"Whether an instrument shall be considered a lease or only an agreement for a lease depends on the intentions of the parties to be collected from the whole instrument; the law will rather do violence to the words than break through the intent of the parties, *by construing it a lease when the intent is manifestly otherwise.*

"An instrument respecting the letting of premises, though containing words of present demise, *but in which was inserted an agreement by the owner to make alterations and improvements and by the other party to take a lease when the premises should be so altered and improved and the term was stipulated to commence from the day that the premises should be altered and improved in the manner agreed on, was accordingly held not to be a lease but an agreement for a lease only.*"

In Potter *vs.* Merces, 53 Cal. 671, the rule is stated in the following terms:

"Where an agreement for a lease has been reduced to writing, and even though it contains a stipulation that a formal lease in writing shall be subsequently executed, the question has frequently arisen whether the written agreement operates as a lease *in presenti*,

or only as an agreement for a lease *in futuro*. In such case the rule, as well established by numerous decisions, is: *First*, that effect will be given to the instrument according to the intention of the parties, to be ascertained from all the terms of the instrument itself, considered in the light of the surrounding circumstances; *second*, that if the instrument contains words of a present demise it will be deemed a lease *in presenti*, unless it appear from other portions of the instrument that such was not the intention of the parties; *third*, that if possession *be given* under the agreement this will be a circumstance tending to prove that it was intended as a lease *in presenti*."

Citing—

Chapman *vs.* Towner, 6 M. & W. 100.

Jones *vs.* Reynolds, 1 Q. B. 306.

Doe *vs.* Benjamin, 1 Perry on D. 440.

Bacon *vs.* Bowdoin, 22 Peck. 401.

People *vs.* Gillis, 24 Wend. 201.

Jackson *vs.* Delacroix, 2 Wend. 433.

As to the liability of a tenant for refusing to make a lease, see Weed *vs.* Lindsay, 20 L. R. A. 33, and brief in note.

It is believed, in view of the authorities cited and upon obvious principles, there can be no question but that the correspondence between the plaintiffs and the defendants' testator amounted to nothing more than an agreement to make a lease, and that by which no interest in the property passed. Charles E. Galt agreed through his brother to make a lease, provided certain repairs should be made to the house. The plaintiffs agreed on July 19, 1900, to make these repairs. They consisted only in providing an electric bell for a bedroom, putting new weights in the lift, and painting the fence in the yard. At an extreme estimate they could have been done in two days. Still up until shortly before September 1, 1900, when Mr. Galt returned to town, they had not been made. It can certainly be assumed that the lease was not signed by Mr. Galt because the repairs were

not made. It can safely be argued that the repairs should have been made before Mr. Galt returned. After his return he was too ill to have the workmen in the house, and the repairs have never been made.

Under these circumstances there not only was no lease made, but Mr. Galt never, according to the terms of his agreement, became obligated to make a lease, because the condition precedent to its execution was never performed.

It is respectfully submitted that for the reasons that have been urged the ruling of the court below was erroneous and should be reversed.

WILLIAM A. McKENNEY,
HAYDEN JOHNSON,

For Appellants.

